IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 661 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE N.G.NANDI
and
Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NATHSING DILIPSING JAT SHIKH

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 661 of 2002

MR RAJESH M AGRAWAL for Petitioner No. 1-2

MR AJ DESAI ld. APP for Respondent No. 1

CORAM : MR.JUSTICE N.G.NANDI
and
MR.JUSTICE D.P.BUCH

Date of decision: 16/09/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE N.G.NANDI)

1. Heard Mr. R.M. Agrawal, learned advocate for the appellants and Mr. A.J.Desai, learned APP for respondent - State.

2. Vide order dated 27.8.2002, this appeal has been admitted and R & P of Special Case No. 110 of 2000, decided by the learned Additional Sessions Judge (Fast Track Court) Kuttch at Bhuj, was ordered to be placed before this Court. The R & P of the trial Court have been received. We have perused the same.

3. Having regard to the facts of the case, this appeal is taken up for final disposal on the request of learned advocate for the appellants convicts as well as the learned APP.

4. By filing this appeal under Section 374 (2) of the Criminal Procedure Code, the appellants have challenged the legality of the judgement dated 8.7.2002 rendered by the learned Additional Sessions Judge (Fast Track Court) Kuttch at Bhuj in Special Case No. 110 of 2000 by which the appellants have been convicted for the offence under Section 15 of the Narcotic Drugs and Psychotropic Substance Act,1985 (hereinafter referred to as "the NDPS Act") and sentenced both the appellants to suffer RI for 10 years and fine of Rs.1 lacs, in default 2 year RI.

5. The prosecution case is that on 18.7.2000, PSI Baloch and Police Constable Girishbhai Varjang were on patrolling duty at about 17.00 hours in Bhuj city area and while in patrolling, they came near the S.T.Depot. and came to the police chowki in the S.T.Depot. At that time, ASI Khajansingh Yadav, Police Head Constable Ramesh Bhanushankar Pandya and Police Constable Vasant Vichiya met them at about 17.45 hours and they came to know that two gentlemen were seen coming with two cotton bags, whereupon PI Chauhan suspected and called both these persons to the police chowki and asked about the contents in the cotton bags that each of them were having. Whereupon, both the persons stated that they were having poppy straw in the cotton bags with them. Thereafter, the PI called the Head Constable and asked him to call two Panchas and Police Constable Ramesh Bhanushankar was asked to bring a person with scale and weights to weigh the poppy straw which was stated to be with the accused persons. Thereafter, Panchas Salim Ausaman Sama and Batukgar Nsengar Gusai came to the place of incident and

both of them were told to remain as Panchas and in presence of the Panchas, names of both the persons were asked and they gave their names as Nathsingh Dilipsingh Jat and Bantsingh Arajansingh Jat respectively. That accused nos.1 and 2 did not follow Hindi properly and they were speaking Hindi - Punjabi mix language. Whereupon, PI Chauhan through Head Constable Khanjansingh, who knew Punjabi language, explained to accused nos. 1 and 2 whether they want the search of the cotton bags with them to be taken before any Gazetted Officer and if they want to do so, their demand will be accepted. As per the prosecution case, accused nos. 1 and 2 told the police that they have no objection if the police takes search of their cotton bags. Whereupon, the PI Chauhan in presence of Panchas opened the cotton bags which accused nos.1 and 2 were having and on opening the same, it was found that there was one polythene bag which is normally used for keeping fertilizers and found poppy straws therein. In the meantime, Police Constable Ramesh Pandya came with scale and weights along with Pramodbhai Shankarlal Jethi and the muddamal poppy straw were got weighed by him. That from the cotton bag which was with accused no.1 Nathsingh Dilipsingh Jat poppy straw weighing 6 kg. was found, and from the cotton bag of accused no.2 Bantsingh Arjansingh Jat poppy straw weighing 3 kg. was found. From both these quantities, sample of 50 grams each for the purpose of sending it to the laboratory for test and report were taken in the plastic boxes and slip containing the signature of the Pnachas were put in both these plastic boxes, and plastic boxes were packed and the same were kept in cotton bag and seals were applied on each of the packing. That in the personal search of accused no.1 in presence of Panchas, two currency notes of Rs.100/- each, one currency note of Rs.50/- and three currency notes of Rs.10/- each were found. Thus, in all Rs.280/- were found from the personal search of accused no.1 and same were taken for the purpose of investigation. That from the personal search of accused no.2 Bantsingh Arjansingh Jat, identity card of Election Commission of India was found which was taken along with one currency note of Rs.100/-, one currency note of Rs.50/- and three currency notes of Rs.10/- each. Thus, in all Rs.210/- were found from the personal search of accuse no.2 and same were taken for investigation. All these details were noted in the Panchnama. Both the bags were taken by drawing the panchanama as the accused persons could not produce any licence or permit for possessing the poppy straw. That detailed panchanama was drawn at the place of occurrence. That the remaining quantity of poppy straw was packed and sealed applied thereon, and taken in possession for

investigation. Thereafter, the complaint was filed by PI Chauhan in Bhuj City Police Station against the accused persons for unauthorisedly / illegally possessing the poppy straw and thereby, committing offence under Section 15 of the NDPS Act.

Thereafter, the PI Chauhan informed the Superintendent of Police about the arrest of accused nos.1 and 2 and the muddamal was handed over to Writer Head Gordhanbhai. Thereafter, the offence was registered by the Bhuj City Police Station. That in course of the investigation, it was revealed that the stock of the poppy straw, which was found from accused nos. 1 and 2, was sold by accused no.3 Satishbhai Shankarji Majirana, who did not have any licence or permit for possessing the poppy straw and offence was registered against all the three persons under Section 15 of the NDPS Act.

6. That the muddamal poppy straw which was handed over to Writer Head Gordhanbhai was kept in the sealed condition in Bhuj City Police Station in muddamal room, and the further investigation was handed over to PSI Balvantsinh Chauhan.

7. That PSI Balvantsinh Chauhan thereafter recorded the statement of Pramod Shankarlal Jethi, who had weighed the muddamal and obtained the police remand against accused nos. 1 and 2. Thereafter, the investigation was made at Bhildi and it was further revealed that the muddamal was handed over by accused no.3 Satishbhai to accused nos. 1 and 2, whereupon the accused no.3 was arrested and the muddamal was sent for analysis to Forensic Science Laboratory, Junagadh. The report was received from Forensic Science Laboratory, Junagadh and the same was kept in the police papers. The report reveals that the muddamal was poppy straw and on completion of the investigation, the charge sheet was filed against all the three accused persons and the accused persons were presented before the Special Court for the offence under Section 15 of the NDPS Act.

8. The charge against the accused persons came to be framed vide Exh.6. The accused denied the charge levelled against them and claimed to be tried. The prosecution in order to bring home the guilt to the accused adduced oral as well as documentary evidence. Thereafter, further statement of the accused persons under Section 313 of the Criminal Procedure Code was recorded, giving opportunity to the accused persons to explain the circumstances incriminating against them emerging from the prosecution evidence. The defence is

of denial.

9. The learned trial Judge on appreciation of the evidence acquitted the accused no.3 Satishbhai Shankarbhai Majirana of the charge levelled against him. However, accused no.1 Nathsing Dilipsing Jat and accused no.2 Bantisng Arjunsing Jat have been found guilty for the offence under Section 15 of the NDPS Act and sentenced each of the accused persons to undergo RI for 10 years and fine of Rs.1 lacs and in default, 2 years RI. It is this judgement of conviction and sentence which has been assailed in the present appeal.

10. It is suggested from the prosecution case as well as the impugned judgement of conviction that appellant nos. 1 and 2 are found to have possessed poppy straw weighing 6 and 3 kg. respectively for which they have been found guilty and sentenced as above.

It is submitted by Mr. R.M. Agrawal, learned advocate for the appellants convicts that the amended provisions of NDPS Act,1985 were not brought to the notice of leaned trial Judge as far as the sentence that could be imposed for the offence punishable under Section 15 of the NDPS Act looking to 6 and 3 kg. poppy straw respectively proved to have been found from appellants accused nos. 1 and 2. It is also stated that new provisions of NDPS Act were also not argued before the learned trial Judge canvassing that the minimum sentence would not be 10 years and fine of Rs.1 lac as imposed by the learned trial Judge, and even if the offence is proved the sentence attracted would be 10 years maximum and not the sentence of minimum 10 years.

11. The reading of the impugned judgement makes it clear that the learned trial Judge has proceeded on the footing as if there is no amendment in Section 41 of the NDPS Act which will have application to the facts of the present case on the point of sentence and as the learned trial Judge was inclined to impose minimum punishment as prescribed under the unamended provisions of the NDPS Act, the learned trial Judge has while imposing the sentence observed that reading Section 15 of the NDPS Act the minimum sentence prescribed is 10 years RI and minimum fine of Rs. 1 lac and maximum 20 years RI and fine of Rs.2 lacs and that for the reasons to be recorded, the Court can also impose fine exceeding Rs.2 lacs.

12. The Parliament has enacted the Narcotic Drugs and Psychotropic Substance (Amendment) Act,2001. Section 41

sub-section (1) of the Amending Act reads as under :

41.(1) Notwithstanding anything contained in sub-section (2) of section 1, all cases pending before the courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence :

Provided that nothing in this section shall apply to cases pending in Appeal."

The Ministry of Finance (Department of Revenue) has issued Notification dated September 27, 2001 in exercise of the powers conferred by sub-section (2) of Section 1 of the ND & PS (Amendment) Act, 2001 appointing October 2, 2001 as the date on which the said Act has come into force in the whole of India. In the present case, the trial against the appellant had concluded on November 05, 2001 but before that date the Amending Act had come into force and therefore in view of the provisions of Section 41 of the Amending Act, there is no manner of doubt that the case of the appellant ought to have been disposed of in accordance with the provisions of the Principal Act as amended by the Amending Act and the question of punishment ought to have been considered in the light of provisions of the Amending Act. Section 21 after the new Amendment is as under :

"21 Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter - States, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable --

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to six months, or

with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves quantity, lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;

(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees.

Provided that the court may, for reasons to be recorded in the judgement, impose a fine exceeding two lakh rupees."

In exercise of the powers conferred by the clauses (viia) and (xxiiia) of Section (2) of the NDPS Act, 1985 and in supersession of Ministry of Finance, Department of Revenue Notification SO 527(E) dated 16th July,1996, the Central Government has, by a Notification S.0.1055(E) dated October 19,2001 specified the quantity mentioned in columns 5 and 6 of the Table prescribed below it, in relation to the narcotic drug or psychotropic substance mentioned in the corresponding entry in columns 2 to 4 of the said Table, as the small quantity and commercial quantity respectively for the purpose of the said clauses of that Section. As per the table, so far as Heroin is concerned, the small quantity specified is 5 grams whereas the commercial quantity specified is 250 grams. There is no manner of doubt that what was found from the possession of the appellant was 154.6 grams of Brown Sugar and the contravention involves quantity, lesser than commercial quantity but greater than small quantity. Therefore, the rigorous imprisonment could have extended to 10 years and with fine which could have extended to Rs. 1 lac.

13. Entry No.110 of the TABLE [SO1O55 (E)] dated 19.10.2001 which deals with the poppy straw reads as

follows :

TABLE

(See sub-clause(viia)and(xxiiia) of section 2 of the Act)

SI No	Name of Narcotic Drug and Psycho-tropic Substance (International non-proprietory name (INN)	Other non-propriety name	Chemical Name	Small Qty. (in gm.)	Comm. Qty. (in gm./ kg./)
1	2	3	4	5	6
110	Poppy straw			1000	50kg.

14. As seen from the impugned judgement, the learned Judge has proceeded on the footing that the provisions of the unamended Principal Act are applicable to the facts of the present case and, therefore, the learned Judge has not heared either the appellants or the learned advocate on the aspect of quantum of punishment in light of the amended provisions of the NDPS Act. It need hardly be said that the appellants are entitled to point out that the imprisonment for a term should not extend to 10 years and that the fine also should not extend to Rs.1 lac, and it would also be open to the appellants to contend that looking to the facts and the quantity of the poppy straw which is proved to have been recovered would attract the punishment lesser than the maximum punishment together with fine.

15. Under the circumstances, we are of the opinion that in view of the amended provisions of NDPS Act,1985, the learned Judge is not justified in imposing the minimum punishment as prescribed under the unamended Principal Act.

16. Having regard to the facts of the case, we are of the view that the interest of justice would be served if the matter is remanded to the learned trial Judge for reconsidering the aspect of quantum of punishment to be imposed on the appellants.

17. The appeal succeeds as indicated above. The decision on merits at this stage is not challenged by the learned counsel for the appellants and, therefore, the findings recorded by the learned Judge are not interfered with at all at this stage. The matter is remanded to the learned trial Judge who shall consider the aspect of the imposition of punishment in light of amended provisions

of Section 15 of the NDPS Act and the circumstances which may be pointed out by the appellants regarding imposition of sentence on them. It is clarified that after the fresh order is passed by the learned Judge imposing psentence, it would be open to the appellants to challenge the legality of the judgement including merits of the case before the appropriate forum. The appellants shall be heard regarding imposition of sentence by the learned Judge as early as possible and without any avoidable delay, preferably within one month from the date of receipt of writ of this order. Appeal is accordingly allowed. The R & P of the trial Court be returned forthwith.

(N.G.Nandi,J.)

(D.P.Buch,J.)

(vipul)